2001

Salt Lake City v. Brian Broadwater : Brief of Appellee

Utah Court of Appeals

Scott A. Fisher; attorney for appellee.
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IN THE UTAH COURT OF APPEALS

SALT LAKE CITY, Plaintiff / Appellee, vs. **BRIAN BROADWATER,** Defendant / Appellant.	Court of Appeals Case No. 20010702-CA APPELLEE'S BRIEF Nature of Proceeding: Appeal Appeal from the Third District Court, Salt Lake County, State of Utah The Honorable Judge Randall N. Skanchy Priority No. 2

BRIEF OF THE APPELLEE

APPEAL FROM A RULING ON A MOTION TO SUPPRESS, CONVICTION AND JUDGMENT ON THE CHARGE OF DRIVING UNDER THE INFLUENCE OF ALCOHOL, A CLASS B MISDEMEANOR, IN VIOLATION OF SALT LAKE CITY CODE SECTION 12.24.100 (1996), IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT, STATE OF UTAH, THE HONORABLE RANDALL N. SKANCHY, JUDGE, PRESIDING.

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	)	APPELLEE'S BRIEF
Plaintiff / Appellee,	)	Nature of Proceeding: Appeal
vs.	)	
	)	Appeal from the Third District Court,
BRIAN BROADWATER,	)	Salt Lake County, State of Utah
	)	The Honorable Judge Randall N. Skanchy
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I. STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction in this matter pursuant to Utah Code Ann. § 78-2a-3(2)(e) (2001).

II. STATEMENT OF THE ISSUE(S) PRESENTED FOR REVIEW & STANDARD OF APPELLATE REVIEW

Issue(s) for Review. (1) Is the trial court's determination that the officer-citizen encounter was a level one consensual encounter correct as a matter of law? (2) If the defendant was seized or stopped under a "Level II" analysis, was there reasonable articulable suspicion justifying that stop or seizure?

Standard of Review. Factual findings underlying trial courts' decisions regarding motions to suppress are reviewed under the "clearly erroneous standard". State v. Troyer, 910 P.2d 1182 (Utah 1995). A reviewing court "will find clear error only if [it decides] that the factual findings made by the trial court are not

adequately supported by the record." Id. Facts are considered "in a light most favorable to the trial court's determination." Id. An appellate court then "reviews the trial court's conclusions of law based on such facts under a correctness standard, [citation omitted], according no deference to its legal conclusions." Id. See also Salt Lake City v. Ray, 998 P.2d 274, 276 (Utah App.2000).

Preservation of the Argument. The Defendant filed his initial Motion and Memorandum on July 6, 2000. R.13-16. The evidentiary hearing was held 11-27-200 before the Honorable Roger A. Livingston. R.20. The City filed its memo in response on 1-11-2001. R.22-48. The trial court (The Honorable Randall N. Skanchy) issued its ruling on February 8, 2001. R.51. The defendant apparently moved the trial court to reconsider its ruling on 3-26-2001. R.53. The trial court denied that motion for reconsideration on March 28, 2001. R55.

III. RELEVANT STATUTES

Fourth Amendment, United States Constitution (set forth in Defendant's Brief at page 2)

Utah Code Ann. § 77-7-15 (set forth in Defendant's Brief at page 2)

Salt Lake City Code Section 12.24.100 (included as **Addendum A** to this brief)

Salt Lake City Code Section 11.36.130 (included as **Addendum B** to this

brief)

IV. STATEMENT OF RELEVANT FACTS

The City submits the following statement of facts, which is the statement of facts submitted by Richard Daynes on behalf of the City in its Memorandum in Opposition to Defendant's Motion to Suppress (found in the Record at pages 22-25, hereinafter R.22-25). Citation to the record transcript is denoted as R.122/*, where 122 indicates the record page assigned to the first page of the transcript and * indicates the interior pagination of the transcript as submitted to the court.

1. This matter came before the Court on November 27, 2000 for a motion hearing. R.22.

2. Plaintiff was represented by Richard W. Daynes, Senior Assistant City Prosecutor. R.22.

3. Defendant was represented by Ben Hamilton, Attorney for defendant. R.22.

4.Defendant contend[ed] this became a level two stop and that there was not reasonable suspicion for the stop. Video Transcript ("VT") 4:32:20. R.112/3.

5. Two witnesses were called, Officer Gardiner and Officer Hunt of the Salt Lake City Police Department. R.23.

6. Officer Gardiner testified:

a. He ha[d] been a police officer for over 21 years. VT 4:31:55. R.112/2.

b. On March 12. 2000, at 2:10a.m. he received a call to the parking lot at 1440 West 200 South on a suspicious vehicle. VT 4:33:19-50 & 4:39:19. R.112/3.

c. Officer Gardiner d[id] not know who the complaining person was. [VT] 4:33:19[.] R.112/3-4.

d. The parking lot surrounds the tavern. VT 4:43:55. R.112/11.

e. This location is a bar or tavern which sells alcohol. VT 4:33:28. R.112/3.

f. The tavern was closed when the officers arrived. VT 4:48:13[.] R.112/11.

g. There were no other vehicles in the parking lot other than the defendant's vehicle. VT 4:34:08. R.112/4.

h. Officer Hunt was already at the scene when he [Officer Gardiner] arrived. VT 34:19. R.112/4.

i. Both officers parked their vehicles behind the defendant's vehicle and defendant's vehicle was not blocked in, but had clear access to leave the parking lot by pulling forward. VT 4:51:17. R.112/17.

j. Officer Gardiner did not activate his overhead flashing lights but did put a spotlight on the car toward the passenger seat. VT 4:40:36 & 4:51:33. R.112/6.

k. Upon contact with the defendant's car, Officer Gardiner noticed a man passed out or sleeping in the driver's seat of the car. VT 4:41:57. R.112/4.

l. The seat was tilted back at least part way. VT 4:34:58. R.112/4.

m. The defendant['s] car was parked facing eastbound and the engine was running. VT 4:34:40 & 4:41:40. R.112/4.

n. Officer Gardiner believed the defendant might be a DUI driver because the defendant was asleep in his car in a closed Tavern parking lot with the engine running. VT 4:44:45 & 4:48:30. R.112/15.

o. Officer Gardiner believed this might be trespassing in the parking lot. VT 4:39:48 & 4:48:22. R.112/8.

p. Officer Gardiner had some concern for the defendant's safety and thought he might be DUI impaired in a vehicle. VT 4:48:40, 4:49:07, 4:49:11 & 4:49:30. R.112/15.

q. Officer Gardiner knocked on the door of the vehicle. VT 4:35:13

& 4:36:58. R.112/6-7.

r. When the defendant woke up either the defendant opened the window or door, or Officer Gardiner opened the door. VT 4:36:56 & 4:55:27. R.112/13.

s. Upon awaking the defendant spoke with Officer Gardiner. Upon contact with the defendant, Officer Gardiner noticed bloodshot watery eyes, a flushed face, very slurred speech and a strong odor of alcohol. VT 4:35:40, 4:36:36 & 4:37:30. R.112/5.

t. Officer Gardiner made his contact based upon the totality of the circumstances. VT 4:50:55. R.112/16.

7. Officer Hunt testified:

a. Officer Hunt did not activate his overhead lights. VT 4:58:56. R.112/22.

b. Officer Hunt used a flashlight to look into the car. VT 4:59:20. R.112/22.

c. They [Officers Hunt and Gardiner] contacted the defendant by knocking on the window. VT 4:59:27. R.112/22.

d. Officer Hunt first testified that defendant woke up and opened the window, but then could not remember if the defendant opened the window or if the door was opened to talk to the defendant. VT 4:59:27. R.112/23.

e. He d[id] not know and [could]not remember who opened the door or window and whether there was any conversation before defendant got out of he vehicle. VT 5:00:16-5:01:04. R.112/25.

V. SUMMARY OF THE ARGUMENT

The trial court's determination that there was no seizure or illegal detention is correct pursuant to established case law regarding the Fourth Amendment to the Constitution. The encounter qualifies as a Level I consensual encounter under Utah law. In the alternative, there was sufficient reasonable articulable suspicion to justify a Level II stop or seizure. Finally, Community Caretaker Analysis, if applied to these facts indicates that the contact was justifiable under that doctrine.

VI. ARGUMENT.

A. THE TRIAL COURT RULED CORRECTLY THAT THIS WAS A LEVEL I, CONSENSUAL POLICE-CITIZEN ENCOUNTER.

1. The trial court's findings of fact are not clearly erroneous.

Factual findings underlying trial courts' decisions regarding motions to suppress are reviewed under the "clearly erroneous standard". State v. Troyer, 910 P.2d 1182 (Utah 1995). A reviewing court "will find clear error only if [it decides] that the factual findings made by the trial court are not adequately supported by the record." Id. Facts are considered "in a light most favorable to the trial court's determination." Id. The findings of the trial court will be addressed in turn. Those

findings are found in the appellate record at R.51, and in the Defendant's Brief as Addendum A.

a. "Officers pulled behind vehicle of deft, had access to leave if chose to."

Officer Gardiner indicated that both officers' vehicles were parked behind the defendant's vehicle. R112/8. The testimony of Officer Gardiner indicated that the officers did not block in the defendant's car with theirs, and that if he had woken up, he could have driven out of the parking lot. Record at 112/17.

b. "No overhead lights or siren."

The testimony of Officer Gardiner indicated that he did not have his flashing red and blue lights on at the time contact occurred. R.122/6,17. Officer Hunt testified that he did not activate his overhead lights either. R.112/22.

c. "No stealth involved . . . ."

This encounter took place in what Officer Gardiner described as a "fairly well lighted area at that time". R.112/6. Officer Gardiner did not have his rotating overhead lights on, just his spotlight. R.112/6. That spotlight "was lighting up the interior of the [defendant's] vehicle." R.112/9. Officer Gardiner agreed with the defense description of the spotlight as flooding the vehicle interior with pretty bright light, saying "Yeah, it's quite a bit of light." R.112/9. Officer Gardiner was in uniform. R.112/6. The testimony of Officer Gardiner indicated that he

approached the defendant's vehicle on the driver's side. Officer Gardiner indicated that he and Officer Hunt approached the vehicle at the same time for officer safety reasons. R.112/9. Officer Gardiner had a chance to look inside the vehicle before he attempted to communicate with the defendant. R.112/9. At the vehicle, Officer Gardiner used his flashlight. R.112/13. Officer Gardiner observed the defendant asleep in his vehicle, with the seat described as "back" or "tilted back" (reclined to some degree). R.112/10. Finally, officers had to knock on the car window to get the defendant's attention and wake him up. R.112/5.

Officer Hunt testified that the officers had their patrol car headlights on, they both got out and shined their flashlight(s) inside his car. R.112/22. Officer Hunt also indicated that the officers pounded on the window in an attempt to get the defendant's attention to wake him up. R.112/22. Officer Hunt indicated that the defendant then woke up. R.112/23.

d. <u>"No . . . other indicia such as asking to remain . . . ."</u>

Officer Gardiner's testimony at the hearing indicated that he did not recall what, if anything, he said as he "banged" on the window. R.112/14. Officer Hunt indicated that he did not remember whether there was any conversation between Officer Gardiner and the defendant before the defendant was asked to get out of the car. R.112/24.

e. "No . . . other indicia such as . . . display of weapons or otherwise."

Testimony at the hearing indicated that both officers were in uniform. R112/12-13. The transcript does not make any reference to weapons being actively or aggressively displayed, other than what might be implied or expected to be carried by a police officer in uniform, i.e. holstered firearm, holstered pepper spray, and holstered expandable baton.

f. "Asked what he was doing . . . ."

Officer Gardiner indicated that he did not recall giving any verbal commands to the defendant as he was looking through the window. R.112/6. Later, Officer Gardiner agreed that he did not remember what he specifically said as he "banged" on the window, if anything. R112/14. Officer Gardiner indicated that after he had gotten the attention of the defendant that there was some verbal exchange or interaction. R112/5. Officer Gardiner did indicate that when an actual conversation began that the defendant was inside the vehicle. R.112/19. This occurred when the door was open, or when the window was down, with the defendant inside the vehicle. R.112/19.

Officer Gardiner later testified that he "wanted to investigate further, who [the defendant] was, what he was doing." R.112/16. Officer Gardiner indicated that among the questions he asked was "what was he doing". R.112/19.

g. "[D]id not order out of vehicle . . . ."

Officer Hunt's recollection was that the defendant was asked to get out of his car, at some point after the car door was opened. R.112/25. Officer Gardiner testified that the "level and tone of voice that was used to initiate contact with the defendant" was: "Just like we're talking now. Um, no yelling, or demanding something, just talking with him." R.112/18.

h. "[K]nocked on glass . . . ."

Officer Gardiner described his actions as having "knocked on the window". R.112/4-6. This would have been the driver's side window.

i. "[M]ay or may not have opened door".

Officer Gardiner testified that: "I don't know, I don't know what occurred, whether he rolled down the window, or I opened the door, or he opened the door, I do not recall that." R.112/13. Officer Hunt initially suggested that the defendant woke up, and the defendant opened either the door or the window, although he was not sure. Subsequently, Officer Hunt indicated that he was not sure who opened the door first. R.112/23-24.

The findings by the trial court (a - i above) had adequate support in the record and do not rise to clear error.

2. The trial court's application of the law to the facts is correct.

The trial court's conclusion that "No indicia that deft would feel reasonably detained" (R.51) should be read as follows - There were therefore no indicia that the defendant would feel un reasonably detained.

The defendant relies heavily on State v. Struhs, 940 P.2d 1225 (Utah Ct. App. 1997):

> The distinction between a level-one encounter (a purely consensual encounter) and a level-two encounter (a seizure requiring reasonable suspicion) depends on whether, through a show of physical force or authority, a person believes his freedom of movement is restrained. Important to the determination is "whether defendant 'remained, not in the spirit of cooperation with the officer's investigation, but because he believed he [was] not free to leave.'" Furthermore, "the test for when the seizure occurs "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave."

Struhs, 940 P.2d at 1227 (citations omitted). The court describes this as a "totality of the circumstances" test. Struhs, 940 P.2d at 1228.

The factors that where determinative to the Struhs court were (1) "the officer's positioning of her vehicle" - "parking nose-to-nose with defendant's vehicle", (2) "the officer's stealthy approach", (3) "the officer's sudden activation of her high-beam headlights and white take-down lights", (4) "the time of night", (5) "the isolation of the location", and (6) "the confrontational approach made by the officer". Struhs 940 P.2d at 1228.

The case at hand is distinguishable from Struhs. Here, the police officers did

not park nose to nose with the defendant's car, did not blockade it in, and there was an avenue of egress for the defendant's vehicle. There is nothing in the record to suggest that the officers' approach could be characterized as "stealthy" or "confrontational". There is nothing to suggest in the record that the officers drove into the parking lot with their lights turned off and suddenly turned them on. Instead, after arriving in the parking lot the officers turned on a spotlight and directed at the defendant's vehicle. Indeed, the record suggests that until the officers were at the defendant's door knocking on the window with a flashlight or flashlights, the defendant was unaware of their presence, asleep or passed out.

The time of night and the location were the result of the defendant's apparent choice to remain in his vehicle If a citizen decides to remain in a business parking lot after hours, the citizen can reasonably expect to be contacted by officers or other citizens to check on his welfare If a citizen places himself in a similar position he is in essence inviting police officers or concerned citizens to initiate some contact with him. Public policy now requires the citizen who intends to drive to a bar and to drink to have laid plans for an alternative route home. Sleeping it off behind the wheel of a car is unacceptable given that a citizen can awake at any time and drive off while still intoxicated.

This is not a citizen driving home after working a late shift who swerves

because he is tired and is pulled over. This is not a citizen who is pulled over without a driving pattern based on an expired registration. As a matter of public policy, police are doing their job when they contact a citizen under these circumstances. Thus, the time of night combined with the location here reinforce the trial court's appropriate conclusion that the officers' initial contact was a consensual Level I encounter.

Where the citizen's choice of a place to "sleep it off" is behind a tavern and behind the wheel, if an officer here opened the door, that act should be viewed as one facilitating communication during a level I consensual stop, not effecting a stop or seizure. By the officer's testimony, he did not ask the defendant to get out of the vehicle here until he detected an odor of alcohol, and observed bloodshot eyes and a flushed face. Thus, even if the officer opened the door to facilitate communication, the citizen would have been free to terminate the encounter but for the observations of the officer that gave rise to reasonable articulable suspicion as to the offense of driving under the influence. If the officer had opened the door, and if the officer observed nothing giving rise to a reasonable articulable suspicion, the citizen could have terminated the encounter and could have gone on his way

There is nothing in the record to suggest, even if the officer did open the door, that the citizen was not free to terminate the encounter.

B. "EVEN UNDER A "LEVEL TWO" REASONABLE ARTICULABLE SUSPICION / SEIZURE ANALYSIS, THE OFFICERS HAD A BASIS FOR THE CONTACT."

Even if this court determines that this was not a Level I consensual encounter, this court should affirm the trial court's conclusion that a Level II encounter was justified under the totalityof the circumstances:

> Additionally, court finds that after discussion with deft he [Officer Gardiner] had reasonable articulable suspicion of criminal activity, called to the scene by report of suspicious vehicle, it was 2:10 am, outside a closed bar, vehicle was running, passenger prone, passed out or asleep in vehicle. To suspect criminal activity. Evidence therefore was lawfully obtained.

Trial court's "Decision on Motion to Suppress, R.51. Even under a Level II Stop/Seizure Analysis, the totality of the circumstances here merit a finding that those circumstances justified a stop or seizure of the limited nature here.

1. Reasonable Articulable Suspicion of the Offense of Trespass

At the time of this encounter Officer Gardiner had some 21 years of experience in law enforcement. Officer Gardiner indicated that he considered the possibility that the person in the vehicle was trespassing. The officer observed a running vehicle with a reclined person in the driver's seat behind a closed tavern at 2:00AM. Those facts raise a reasonable articulable suspicion of trespass:

> Chapman asserts that all the factors justifying reasonable

> suspicion listed by the trial court are consistent with innocent behavior and thus, cannot amount to reasonable suspicion. The factors enumerated by the trial court were "the lateness and darkness of the hour, the emptiness of the school grounds, the presence of a young teenage female in the vehicle and the fact that Chapman had no apparent lawful business at the school." The trespass ordinance clearly prohibits people from loitering about school grounds in vehicles without any lawful business. The trial court's findings of fact show that a reasonable person would conclude Chapman had violated the ordinance.

State v. Chapman, 841 P.2d 725 (Utah Ct. App. 1992).

The Salt Lake City trespass ordinance reads:

> 11.36.130 Trespass by persons and motor vehicles.
>
> A. It is unlawful for any person to . . . drive . . . or sleep upon the premises of another without the permission of the owner or occupant thereof, or to remain upon such premises after the permission of the owner or occupant thereof has been revoked by such owner or occupant.
>
> * * * *
> * * * *
> * * * *
> * * * *
> * * * *
>
> G. Violation of this section shall be punishable as follows:
>
> 1. Trespass in a dwelling shall constitute a Class B misdemeanor violation.
>
> 2. Entering or remaining upon property, other than a dwelling, where such trespass would cause injury or property damage, shall be a Class C misdemeanor.
>
> 3. Trespass, other than a dwelling, where no damage or injury occurs, is an infraction. (Ord. 88-86 § 60 (part), 1986: prior code § 32-3-3)

(Emphasis added.) Thus, the officer had before him facts that raised a reasonable

articulable suspicion of the offense of trespass, which would justify a Level II stop or seizure. Under the totality of the circumstances, even if Officer Gardiner opened the door prior to making any observations about the condition of the driver (other than being reclined and unconscious), the officer had a reasonable articulable suspicion regarding the offense of trespass.

2. Reasonable Articulable Suspicion of the Offense of DUI

Officer Gardiner indicated that the conversation did not take place through glass, and that it took place with the defendant still in the vehicle. Thus, one of three scenarios may have occurred: the defendant opened the window, the defendant opened the door, or the officer opened the door.

a. If the defendant opened the window on his own, and Officer Gardiner detected the odor of alcohol and slurred speech together in an individual asleep/passed out in a reclined driver's seat of a running car behind a tavern at 2:00AM, a reasonable articulable suspicion regarding the charge of DUI would merit a stop and/or seizure for further investigation.

b. If the defendant opened the door on his own, and Officer Gardiner detected the odor of alcohol and slurred speech together in an individual asleep/passed out in a reclined driver's seat of a running car behind a tavern at 2:00AM, a reasonable articulable suspicion regarding the charge of DUI would

merit a stop and/or seizure for further investigation.

c. If the officer opened the door. The final scenario is where Officer Gardiner wakes the defendant and then opens the door on the officer's own initiative. Apparently the door was unlocked. Even here there are three "sub-scenarios": (1) the officer opens the door without making any observations about the defendant, and (2) the officer observes bloodshot eyes but no speech and opens the door, and (3) the officer observes bloodshot eyes and slurred speech and then opens the door.

(i) Sub-scenario (1). In this scenario the officer observes a person asleep/passed out/unconscious in the driver's seat of a running car behind a tavern in the early morning hours. The record indicates that the officer considered the possibility that the defendant was trespassing. The nature of the detention (opening the door) and intrusion was reasonable in light of the totality of the circumstances, as set forth above.

(ii) Sub-scenario (2). If the officer observed the defendant behind glass but did not speak with him, he would have been able to see/observe the following through glass: bloodshot eyes and flushed face. Bloodshot eyes and flushed face in a person asleep/passed out behind a tavern at 2:00 in the morning is sufficient to create a reasonable articulable suspicion and the officer would have been entitled to

open the defendant's door at that point.

(iii) Sub-scenario (3). If the officer waited to speak with the defendant through the window glass, he would have been able to see/observe the following through glass: slurred speech, bloodshot eyes and flushed face. Those observations in a person asleep/passed out behind a tavern at 2:00 in the morning are sufficient to create a reasonable articulable suspicion and the officer would have been entitled to open the defendant's door at that point.

What the defendant appears to be suggesting is that at some point the defendant would have been entitled to have just driven away from the scene. That was not going to happen given the totality of the circumstances. If the defendant refused to roll down his window, preventing the officer from detecting any odor of alcohol, the officer would still have observed slurred speech, bloodshot watery eyes, and a flushed face. Those factors combined with the context (time of day, location, car running) would have justified the officer in seizing the defendant under a Level II encounter analysis. Thus, under any conceivable scenario, the defendant would not have been free to leave the scene.

3. Community Caretaker Analysis as an alternative ground for affirmance.

Community caretaker analysis (CCA) is also applicable to this matter. Although CCA was not set out by name the concerns at the core of CCA were

brought to the attention of the trial court. People v. Ciesler, 304 Ill.App.3d 465, 710 N.E.2d 1270, 238 Ill.Dec. 168, was presented to the trial court in the City's memorandum, and is found in the current appellate record at R.35-39. Ciesler refers to the "community caretaking function or public safetyfunction":

> Defendant's argument that Officer Berry was required to have articulable suspicion that he had committed an offense before she approached him does not change our conclusion. A police officer does not violate a person's constitutional rights merely by approaching the person on the street or in another public place and putting questions to the person if he is willing to listen. Such a police-citizen encounter does not involve coercion or detention and is referred to as a community caretaking function or public safetyfunction.

Ciesler at 304 Ill.App.3d 465, 471, 710 N.E.2d 1270, 1275, 238 Ill.Dec. 168, 173, R.39 (Citations omitted.)

This court can affirm the trial court decision based on a "community caretaker" analysis:

> However, appellate courts "can affirm the trial court on any proper legal ground." State v. Hansen, 837 P.2d 987, 988 (Utah Ct. App. 1992). To do so, the legal ground must be "apparent on the record" and sufficiently briefed by the appellee. State v Montoya, 937 P.2d 145, 149-50 (Utah Ct. App. 1997).
>
> The State asserts that the decision allowing the search can be most easily affirmed as a search incident to arrest. That ground was "apparent on the record" because the record here contained "sufficient and uncontroverted evidence supporting the [search incident to arrest] to place [Chevre] on notice that the [State] may rely thereon appeal." Id. The State also briefed the alternative ground of search incident to arrest. Therefore, we need not determine whether the search can be upheld as a valid inventory search if we can affirm on the alternative

ground of search incident to arrest.

State v. Chevre, 994 P.2d 1278 (Utah Ct App. 2000).

The initial inquiry is properly directed at the basis for police contacting the defendant in his vehicle under the circumstances presented here. The correct analysis falls under the heading of "community caretaker stops", as delineated by Provo City v. Warden, 844 P.2d 360 (Utah Ct. App. 1992). In Warden, the Court set forth a three-part test:

> The trial court must evaluate the legitimacy of an alleged community caretaker stop as follows: First, did a seizure occur under the Fourth Amendment definition of that term? Second, based upon an objective analysis, was the seizure in pursuit of a bona fide community caretaker function – under the given circumstances, would a reasonable officer have stopped a vehicle for a purpose consistent with community caretaker functions? Third, based upon an objective analysis, did the circumstances demonstrate an imminent danger to life or limb?

Warden, 844 P.2d at 364

The motion hearing testimony supports the conclusion that at the point officers arrived, the defendant would have been free to leave, and was in fact not seized for purposes of the Fourth Amendment. However, in the alternative, the motion hearing testimony supports the conclusion that any "seizure" was in pursuit of a "bona fide" community caretaker function.

Finally, the testimony indicates the circumstances demonstrated an imminent danger to life or limb. An unconscious person in a running car might run the risk of

carbon monoxide poisoning, or accidentally putting the car into gear and endangering self or others. An intoxicated person asleep or passed out in a car runs the risk of accidentally engaging the car, or awakening and intentionally driving the car, putting self or others at risk. An ill person left unattended in a car runs the risk presented by whatever malady has stricken – a heart attack would be one example.

Officer Gardiner testified that: "Well, that wasn't my overriding concern [concern for the defendant's safety] but he was alone in the vehicle, and if indeed he had been drinking some, or too much, that's just not a good area to be um, impaired in a vehicle." R.112/15. This comment implies a concern for the safety of an impaired person who has made himself vulnerable to predatory conduct by others.

VII. CONCLUSION

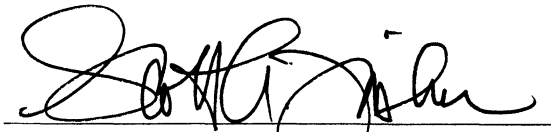
The defendant was not seized when the officers came upon him in his vehicle. There was no seizure prior to Officer Gardiner's detection of an odor of alcohol and observation of the defendant's flushed face and bloodshot eyes. The defendant was in his vehicle, and free to terminate the encounter even if Officer Gardiner had opened the door to his car. There was no seizure prior to the defendant committing an offense in the presence of the officers.

In the event this court rules otherwise, the evidence supports a finding that

reasonable articulable suspicion existed meriting the limited intrusion represented by the nature of any stop or seizure here.

The City respectfully requests that this court affirm the ruling of the trial court, denying the defendant's motion to suppress, allowing the defendant's conviction to stand upon remand to the trial court.

RESPECTFULLY SUBMITTED this 24TH day of June, 2002.



SCOTT A. FISHER (SB #6728)
Senior Assistant City Prosecutor
Attorney for Plaintiff/Appellee

ADDENDUM A

12.24.100 Driving Under The Influence Of Drugs And Intoxicants Prohibited-Penalties:

A. It is unlawful and punishable as provided in this Section for any person to operate or be in actual physical control of a vehicle within this City if the person has a blood or breath alcohol content of 0.08 grams or greater by weight as shown by a chemical test given within two (2) hours after the alleged operation or physical control, or if the person is under the influence of alcohol or any drug, or the combined influence of alcohol and any drug to a degree which renders the person incapable of safely driving a vehicle within the City. The fact that a person charged with violating this Section is or has been legally entitled to use alcohol or a drug does not constitute a defense against anycharge of violating this Section.

B. Percent by weight of alcohol in the blood shall be based upon grams of alcohol per one hundred milliliters (100 ml) of blood, and the percent by weight of alcohol concentration in the breath shall be based upon grams of alcohol per two hundred ten liters (210 l) of breath.

C. Every person who is convicted of a violation of subsection A of this Section shall be guilty of a Class B misdemeanor.

1. The court shall, upon a first conviction, inpose either:

a. A mandatory jail sentence of not less than forty eight (48) consecutive hours nor more than two hundred forty (240) hours; or

b. Require the person to work in a community-service work program for not less than twenty four (24) hours nor more than fifty (50) hours.

2. The court shall also order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, at the person's expense.

3. The court shall also impose a fine of not less than seven hundred dollars ($700.00) nor more than one thousand dollars ($1,000.00).

D. 1. Upon a second conviction of subsection A of this Section within five (5) years after a first conviction the court shall inpose either:

a. A mandatory jail sentence of not less than two hundred forty (240) consecutive hours nor more than seven hundred twenty (720) hours; or

b. As an alternative to all or a part of a jail sentence, require the person to work in a community-service work program for not less than eighty (80) hours nor more than two hundred forty (240) hours.

2. In addition to the requirements of subsection D1a or D1b of this Section, the court shall order the person to participate in an assessment and educational series at a licensed alcohol rehabilitation facility, and the court may, in its discretion, order the person to obtain treatment at the person's expense at an alcohol rehabilitation

facility.
3. The court shall also impose a fine of not less than eight hundred dollars ($800.00), nor more than one thousand dollars ($1,000.00).
E. 1. Upon a subsequent conviction of subsection A of this Section within five (5) years after a second conviction, the court shall impose either:
a. A mandatory jail sentence of not less than seven hundred twenty (720) hours nor more than two thousand one hundred sixty (2,160) hours, with emphasis on serving in the drunk tank of the jail; or
b. As an alternative to all or a part of a jail sentence, require the person to work in a community-service work project for not less than two hundred forty(240) hours nor more than seven hundred twenty(720) hours.
2. The court shall also impose a fine of not less than nine hundred dollars ($900.00), nor more than one thousand dollars ($1,000.00).
F. In no event shall any combination of imprisonment and/or community service imposed under subsections C, D and E of this Section exceed six (6) months' duration.
G. 1. When the prosecution agrees to a plea of guilty or no contest to a charge of a violation of Section 12.52.350 of this Title, or its successor, in satisfaction of, or as a substitute for, an original charge of a violation of this Section, the prosecution shall state for the record a factual basis for the plea, including whether or not defendant had consumed alcohol or drugs, or a combination of both, in connection with the offense. The prosecutor's statement shall be an offer of proof of the facts which show whether or not defendant had consumed alcohol or drugs, or a combination of both, in connection with the offense.
2. The court shall advise the defendant, before accepting the plea offered under subsection G1 of this Section, of the consequences of a violation of Section 12.52.350 of this Title, or its successor, in substance as follows: "If the court accepts the defendant's plea of guilty or no contest to a charge of violating said Section 12.52.350, and the prosecutor states for the record that there was consumption of alcohol or drugs, or a combination of both, by the defendant in connection with the offense, the resulting conviction shall be a prior offense for the purpose of subsections D and E of this section."
H. A peace officer may, without a warrant, arrest a person for a violation of this Section when the officer has reasonable cause to believe a violation has in fact been committed by the person, although not in the officer's presence.
I. This Section was enacted to be in harmony with and, in substance, the same as section 41-6-44, Utah Code Annotated, 1953, as amended, or its successor. (Ord. 23-96 § 1, 1996: Ord. 85-92 § 1, 1992: Ord. 60-92 § 1, 1992: Ord. 82-87 § 1, 1987:

prior code Title 46, Art. 6 § 105)

ADDENDUM B

11.36.130 Trespass by persons and motor vehicles.

A. It is unlawful for any person to take down any fence, or to let down any bars, or to open any gate so as to expose any enclosure, or to ride, drive, walk, lodge, or camp or sleep upon the premises of another without the permission of the owner or occupant thereof, or to remain upon such premises after the permission of the owner or occupant thereof has been revoked by such owner or occupant.

B. It is unlawful for any person to drive or park any motor vehicle, motorcycle or motor-driven cycle upon any city-owned property not designated for vehicular traffic or parking without permission of the mayor of the city or his or her designated appointee.

C. It is unlawful for any person to operate any type of motor vehicle (including but not limited to motorcycles, trail bikes, dune buggies, motorscooters or jeeps) upon the private property of another, without first obtaining the written permission of the person in lawful possession of the property or, if the property is unoccupied, the owner of such property.

D. It is unlawful for any person to operate any type of motor vehicle (including but not limited to motorcycles, trail bikes, dune buggies, motorscooters or jeeps) upon any public property, except designated streets, highways or alleys, without first obtaining the written permission of the public entity which is in possession of such property or, if the property is unoccupied, the public entity which owns such property.

E. Every person who operates any type of motor vehicle upon the private property of another or upon any public property, except as hereinabove provided, at all times while so operating such motor vehicle shall maintain in his or her possession the written permission required by the two preceding subsections, except that, if the same document grants permission to two or more persons, a person named in such document need not have it in his or her possession while another person named in the same document, riding in the same group and not more than three hundred feet from such person, has such document in his or her possession.

F. This section does not prohibit the use of such property by the following:

1. Emergency vehicles;

2. Vehicles of commerce in the course of normal business operations;

3. Vehicles being operated on property devoted to commercial or industrial purposes where such operation is in conjunction with commercial or industrial use and permission for such operation is implied or expressly given by the person in possession of said property;

4. Vehicles operated on property actually used for residential purposes, where such vehicles are there at the express or implied invitation of the owner or occupant;

5. Vehicles being operated on public or private parking lots, where permission to do so is implied or expressly given by the person in possession of such lot.

G. Violation of this section shall be punishable as follows:

1. Trespass in a dwelling shall constitute a Class B misdemeanor violation.

2. Entering or remaining upon property, other than a dwelling, where such trespass would cause injury or property damage, shall be a Class C misdemeanor.

3. Trespass, other than a dwelling, where no damage or injury occurs, is an infraction. (Ord. 88-86 § 60 (part), 1986: prior code § 32-3-3)

CERTIFICATE OF DELIVERY

The undersigned hereby certifies that he/she caused true and correct originals and/or copies of the foregoing Brief of the Appellee to be mailed or delivered as indicated below on this 24TH dayof June, 2002:

UTAH COURT OF APPEALS (1 original, 7 copies)
Matheson Court House
450 South State Street, Fifth Floor
Salt Lake City, Utah 84114-0230

BENJAMIN A. HAMILTON (SB# 6238) (2 copies)
Attorney for Defendant / Appellant
356 East 900 South
Salt Lake City, Utah 84111

FOR SALT LAKE CITY CORPORATION